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Exhibit B

Court of Appeal
State of California
First Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number:_____ Division:_____

Case name: The Utility Reform Network v. Public Utilities Commission of the State of California

Please check the applicable box:

There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 14.5(d)(3).

X Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1. AT&T California	Major party to the proceeding
2. Verizon California, Inc.	Major party to the proceeding
3. SureWest Telephone	Major party to the proceeding
4. Frontier Telecommunications Co. of California	Major party to the proceeding

Please attach additional sheets with Entity or Person information if necessary.

Signature of Attorney/Party Submitting Form

Printed Name: William R. Nusbaum
Address: 711 Van Ness Ave., Suite 350 SF, CA 94102

State Bar No: 108835
Party Represented: The Utility Reform Network

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

DIVISION ____

THE UTILITY REFORM NETWORK,

Petitioner

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent.

CPUC Decision No. 06-08-030

PETITION FOR WRIT OF REVIEW; MEMORANDUM OF POINTS AND AUTHORITIES

(APPENDIX OF EXHIBITS IN SUPPORT OF PETITION FILED SEPARATELY)

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Dated: January 18, 2007

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
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CPUC Decision No. 06-08-030

PETITION FOR WRIT OF REVIEW

TO HONORABLE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

I.
ISSUES PRESENTED

1. Did the California Pubic Utilities Commission ("Commission" or "CPUC") fail to proceed in a manner required by law when it considered the issue of geographic deaveraging in its Final Decision, D.06-08-030, when that issue had not been identified as within the scope of that proceeding nor properly added to that scope?[1]

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[1] The Court of Appeal recently addressed a similar beyond-the-scope Commission decision in *Southern California Edison v. Public Utilities Commission* (2006) 140 Cal.App. 4th 1085.

2. Did the Commission fail to proceed in a manner required by law when it considered the eliminating issue of asymmetric marketing, disclosure and administrative processes in its Final Decision, D.06.08.030 , when that issue had not been identified as within the scope of that proceeding nor properly added to that scope?

3. Did the Commission fail to make sufficient findings of fact addressing the arguments contrary to its conclusion that incumbent local exchange carriers lacked market power and that competitive alternatives exist, in violation of Section 1705 of the Public Utilities Code?

4. Did the Commission fail to proceed in a manner required by law when it granted retail pricing flexibility to incumbent local exchange carriers without making the necessary findings pursuant to Public Utilities Code §495.7.?

5. Did the Commission abuse its discretion when, in D.06-08-030, it approved geographic deaveraging and elimination of "asymmetric" regulation where the underlying findings regarding market power and competitive alternatives lack sufficient record support?

II.
PRELIMINARY STATEMENT

In a single decision issued last year, the California Public Utilities Commission deregulated the four largest telecommunications companies in California – AT&T, Verizon, SureWest and Frontier – with regard to local phone

service. With its "Uniform Regulatory Framework" or "URF" decision (D.06-08-030), the agency removed most pricing restrictions (including the longstanding practice of geographic averaging, that is, charging the same price to all service recipients within a defined service territory), as well as eliminating constraints on promotions or packaging of new or existing services. In addition, the URF decision permitted the phone companies to eliminate any service conditions previously required by the Commission that were not also applicable to their purported competitors. As a result, the terms and conditions that pertain to local phone service will now be determined by the service providers, rather than the regulatory agency charged with ensuring that California consumers have meaningful access to this essential public service.

The Commission's decision represents a profound change in the manner in which the dominant telephone companies are treated in California. It also represents a significant departure from one of the most fundamental obligations of the Commission – the affirmative responsibility to ensure that rates paid by consumers for telecommunications services are "just and reasonable" as mandated by the California Public Utilities Code ("Code") Section 451 and 454. While the Code has been amended many times and new responsibilities for the Commission have been added, the overriding requirement that rates charged for local phone service be "just and reasonable" has survived. Over the years the California Legislature has called for increased competition and encouragement of the development and deployment of "state-of-the-art" technologies for all California

consumers. Through it all, though, the Legislature retained the directive that the Commission must also promote "lower prices" and the "avoidance of anticompetitive conduct."[2]

The statutory responsibilities of the Commission are not optional – the Commission cannot cherry-pick amongst them, choosing the obligations it thinks are more important to the detriment of others. Yet, that is precisely what the Commission has done in the URF decision, with numerous actions justified on the basis of assigning highest priority to fostering competition and the deployment of advanced technology, with mere lip service given to the notion that "just and reasonable" rates are sure to follow, thanks to competition that for many California consumers is still far more theoretical than real.

While on first impression the subject matter of the URF proceeding and decision may seem dense and complex, the impact on consumers is tangible and direct. With the URF decision, consumers will no longer be able to rely upon the Commission to ensure that rates are "just and reasonable." And under that decision, consumers in rural and other high-cost locations can no longer be assured that the rates they pay will be roughly equivalent to the rates paid by their urban counterparts. Rather, the "competitive marketplace" will replace Commission oversight as the vehicle for ensuring that such consumers are treated in an equitable manner, in apparent disregard of the fact that the incumbent local

[2] See California Public Utilities Code Section 709, particularly 709(f).

exchange carriers continue to dominate the provision of local exchange service within their designated service territories.

The URF decision also presents significant due process issues. The Commission must adhere to its own rules and procedures. At minimum, the Commission cannot define the scope of a proceeding, only to issue a decision that ignores that scope. Yet that is precisely what the Commission did here with respect to two significant issues – geographic deaveraging and the elimination of "asymmetric" marketing regulations. In both instances the issue was not included in the Commission's Scoping Order, nor was that order ever amended to identify either issue as now within the proceeding's scope, even though TURN and other parties requested such clarification. This denied parties such as TURN any meaningful opportunity to participate in the deliberation regarding these issues. And the adopted outcomes on these late-added issues were distinctly anti-consumer: eliminating the practice of setting consistent rates in favor of permitting "geographic deaveraging" puts California's rural and other "high cost" consumers at risk of rate increases they had never before faced, while the first measures scuttled in the name of eliminating "asymmetric" regulation were protections afforded AT&T customers in partial remedy of the company's ongoing and repeated marketing abuses. Whether or not one agrees with these dubious outcomes, the Commission cannot be permitted to abuse its discretion by adding issues of such import to a proceeding that had been earlier defined in such a way that they seemed excluded.

III.
PETITION FOR WRIT OF REVIEW

A. Jurisdiction, Venue and Parties

1. This Court has original jurisdiction to review the Decision pursuant to Public Utility Code Section 1756(a). Section 1756(a) authorizes any aggrieved party to "petition for a writ of review in the court of appeal or the Supreme Court for the purpose of having the lawfulness of the [CPUC's] original order or decision . . . inquired into and determined."

2. The Commission adopted the Decision, designated as Decision ("D.") 06-08-020, on August 24, 2006, and the Decision was mailed to the parties on August 30, 2006, Exhibit E. Petitioners filed an application for rehearing of the Decision on September 29, 2006, Exhibit F. The Application for Rehearing was filed within 30 days of the date of mailing of the Decision, and was therefore timely under Public Utility Code Section 1731(b). The Commission issued an Order Modifying and Granting Limited Rehearing of Decision 06-08-030, and Denying Rehearing of Decision, As Modified, In All Other Respects, which was mailed to the parties on December 19, 2006, D.06-12-044, Ehibit. G. This petition for writ of review is filed within 30 days of the date of mailing of the order denying rehearing, and is therefore timely, Public Utility Code Sections 1756 (a) and (c).

3. Petitioners are entitled to a plenary review on the merits by this Court to set aside the Commission's unlawful Decision. Review by a petition for

writ of review is the "sole means provided by law for judicial review of a [CPUC] decision." *Consumers Lobby Against Monopolies v. Public Util. Comm'n*, 25 Cal.3d 891, 901 (1979). A petition for writ of review is governed by a standard different from other writs; the Court may not summarily deny the petition unless it is facially apparent that the petition both (1) lacks merit, and (2) fails to raise important issues. *Pacific Bell v. Public Util. Comm'n*, 79 Cal.App.4th 269, 281-82 (2000). This petition is both meritorious and raises issues of importance. The Court therefore should issue a writ and grant plenary review of the Decision.

4. Petitioner The Utility Reform Network ("TURN") is a private non-profit consumer advocacy organization in existence since 1973. TURN has approximately 20,000 statewide members, who are residential and small commercial utility customers. TURN represents the interests of its members in proceedings before the CPUC. The Decision directly affects TURN and its members.

5. Respondent California Public Utilities Commission is an agency of the State of California established by Article XII, Section 1, of the Constitution of the State of California.

6. Petitioner TURN has its principal place of business in the County of San Francisco. Accordingly, this petition is properly filed in this District. Public Utility Code Section 1756(d).

7. All exhibits accompanying this petition are true copies of original documents on file with respondent Commission.

B. Factual and Procedural Background

8. The Factual and Procedural Background section of the attached Memorandum of Points and Authorities provides a detailed history of the events leading to the Commission's decision subject to this petition.

C. Prayer for Relief

WHEREFORE, pursuant to Section 1756 of the Public Utilities Code, the petitioners pray that this Court:

1. Issue a writ of review, setting a date when respondent CPUC shall file its return and a certified copy of the record in this matter, and a date when petitioners may respond to that return;

2. Inquire into and determine the lawfulness of the Decision and the Commission's Decision on Rehearing;

3. After review, enter judgment setting aside Decision D.06-08-030 on the points raised in this Petition and directing the Commission to vacate the decision;

4. Remand this matter to the Commission for further proceedings consistent with the Court's ruling; and

5. Grant such other relief as may be just and proper.

Dated: January 18, 2007

Christine Mailloux (Bar No. 167918)

William R. Nusbaum (Bar No. 108835)
Attorneys for Petitioner
The Utility Reform Network

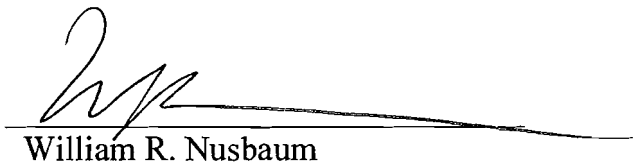
VERIFICATION

I, William R. Nusbaum, declare and state as follows:

I am an attorney duly licensed to practice before the courts of the State of California. I am an attorney for The Utility Reform Network and I am counsel of record for petitioner The Utility Reform Network. I am authorized by the petitioner The Utility Reform Network to make this verification on their behalf. I have read the foregoing Petition for Writ of Review and know its contents. I have personal knowledge of the facts alleged in the petition, and they are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 18, 2007, at San Francisco, California.



William R. Nusbaum

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

DIVISION ___

THE UTILITY REFORM NETWORK,

Petitioner

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent.

CPUC Decision No. 06-08-030

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF REVIEW

I. INTRODUCTION

This petition presents two core issues, each addressing a fundamental principle of regulatory decision-making. First, an administrative agency that fails to abide by the limitations it sets on the scope of a proceeding violates the procedural due process rights of interested parties. The agency's decision must not address issues unless those issues were clearly within the identified scope. And second, an agency cannot ignore statutory obligations or the record in the proceeding in favor of creating a particular regulatory scheme.

The violations of these regulatory principles here led to profound adverse outcomes for California residents. The California Public Utilities Commission has largely abandoned its regulation of local phone service by "landline" carriers such as AT&T (formerly Pacific Bell) and Verizon (formerly GTE-California). As a result, consumers in rural and other harder-to-serve areas of the state face a new risk of price hikes, due to the agency's scuttling of the long-standing practice of "geographic averaging." And consumers in the AT&T service territory (that is, the majority of California) face a return of marketing abuses that had been reined in thanks to specific tariffs the Commission has permitted that carrier to set aside.

As this petition makes clear, both of these outcomes suffer from due process deficiencies, as neither issue was identified as being within the scope of the proceeding and therefore should not have been the subject of any finding or conclusion in the decision. The Court of Appeal has already said as much in *Edison v. PUC* (2006) (140 Cal.App. 4th 1085) when it was presented with similar circumstances.

Perhaps even more troubling is the Commission's attempt to prematurely substitute an ostensibly "competitive market" for the regulatory process for purposes of ensuring Californians pay only "just and reasonable rates." This approach requires the lifting of tariffs that serve as the principle tool for the regulatory process. California law mandates that such lifting may only occur when the Commission has sufficient evidence that meaningful competition for local phone service exists. The decision at issue here, however, relies extensively on

the potential for competition. There is no doubting the Commission's faith that competition for local phone service will continue to grow. California law, however, requires more than a statement of faith before regulators relieve themselves of their statutory obligation to ensure consumers pay only just and reasonable rates. As this petition makes clear, once the faith-based assertions are stripped away, the Commission's determinations about the status of competition for local phone services are inadequately supported and fail to sufficiently address contrary evidence.

II.
STANDARD OF REVIEW

Pursuant to Public Utilities Code Section1756, parties may petition this Court for a writ of review in order to have the lawfulness of a Commission decision determined. This Court must determine whether the Commission, in issuing the Final Decision, "has not proceeded in the manner required by law," whether this Final Decision was "an abuse of discretion," and whether it is "not supported by the findings." Public Utility Code Section 1757.1(a).

While courts can give administrative agencies substantial deference in the judicial review process, the issue of whether the issue of whether an agency has failed to follow proper procedure and provide sufficient notice is to be independently reviewed by the Court. *San Francisco Firefighters Local 798 v. the City and County of San Francisco* (2006) 38 Cal. 4th 653, 667 (2006) *Rosenblit*

v. Superior Court (Fountain Valley Regional Hospital) (1991) 231 Cal. App. 3d 1434; 282 Cal. Rptr. 819.

III.
FACTUAL AND PROCEDURAL BACKGROUND

On April 14, 2005 the California Public Utilities Commission ("Commission") issued an Order Instituting Rulemaking ("OIR") designated as R.05-04-005 with the stated purpose to "assess and revise the regulation of all telecommunications utilities in California.[3] The Commission's "primary goal [was]. . . to develop a "uniform regulatory framework."[4] Only the four respondent incumbent local telephone companies, SBC (now AT&T), Verizon (formerly GTE California), SureWest (formerly Roseville Telephone Company), and Frontier (formerly Citizens Communications) were likely to feel the biggest impact of any changes.[5]

These four carriers, the only utilities made official "respondents" to the rulemaking, had been the subject of a regulatory scheme known as the New Regulatory Framework ("NRF") that the CPUC had initiated in a decision released in 1989 and refined in various additional decisions issued over a several-year period. The purpose of R.05-04-005, then, was to review the viability of the

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[3] Ex. A, *Order Instituting Rulemaking For The Purpose Of Assessing And Revising The Regulation Of Telecommunications Utilities* ("OIR"), R.05-04-005, April 14, 2005, at p. 1. The OIR explicitly exempts small, independent incumbent local exchange carriers from this review.

[4] Ex. A, *OIR* at p. 1.

[5] Ex. A, *OIR* at p. 5.

current regulatory framework for these four incumbent carriers, "NRF", as it applied to the four respondents, in a new telecommunications landscape.[6] Matters at issue in or resolved in proceedings *other than* NRF were generically beyond the scope of the URF proceeding.[7]

In the OIR, the Commission set the schedule for the rulemaking to allow parties opening and reply comments and to propose elements of a regulatory framework consistent with the issues and structure outlined in Appendix A of the OIR.

Before parties filed opening comments, nine parties (including TURN) filed a Motion for Change of Schedule on May 13, 2005.[8] This Motion identified procedural and substantive issues regarding the OIR and requested that the Commission extend the comment period on the OIR and revise the OIR to address the identified deficiencies. On May 19, 2005 the Administrative Law Judge ("ALJ") issued a Ruling in response to TURN's Motion setting a workshop for June 3, 2005 to discuss procedural matters. The OIR remained unchanged and parties filed opening comments on the OIR on May 31, 2005.

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[6] Ex. A, *OIR* at p. 2, (These changes to the telecommunications landscape have created a need for the Commission to conduct a comprehensive examination of the way it regulates telecommunications services.)

[7] *See, for example*, Ex. A, *OIR* at Appendix A, listing service quality and the Commission Universal Lifeline Telephone Service program as outside the scope of the proceeding.

[8] Ex. C, *Motion for Change of Schedule*, Filed May 13, 2005.

TURN and the other parties to the proceeding participated in the workshop on June 3, 2005 discussing scope and procedural matters. At the conclusion of the workshop the ALJ suspended the date for reply comments originally set in the OIR. She requested that parties send her a list of questions and requests for clarification regarding the scope of the proceeding that she would then respond to in a revised scoping memo. Parties did this on June 8, 2005 in an informal email process.

On June 27, 2005 the Commission held a daylong "informational" hearing with speakers from academic, industry, financial and consumer interests in order to, "(i) provide the Commission with a conceptual framework for thinking about issues central to regulatory reform, and (ii) to show the commission how California business, workers, and consumers are affected by the state's telecommunications industry."[9]

On August 4, 2005 the Assigned Commissioner and Administrative Law Judge issued a Scoping Memo.[10] This document was formatted strictly as a response to the parties' requests for clarification submitted on June 8. The Scoping Memo did not set forth a summary or comprehensive list of issues to be included in the scope of the proceeding instead it referenced parties back to the OIR. Parties filed reply comments on the OIR on September 2, 2006.

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[9] Ex. E, *Order Instituting Rulemaking On The Commission's Own Motion to Assess and Revise The Regulation Of Telecommunications Utilities – Decision 06-08-030* ("D.06-08-030") Cal. PUC LEXIS 367, August 24, 2006, at p. 24.
[10] Ex. B, *Scoping Memo.*

On September 9, 2005, TURN filed a pleading discussing the need for hearings in response to the Assigned Commissioner's Scoping Memo.[11] TURN reiterated its request that the Commission to articulate the specific problems that parties should be attempting to solve with a proposed uniform regulatory framework or the objectives of a new framework.[12] Absent such an articulation, TURN could not determine whether hearings would be necessary or even if there were disputed issues of fact. TURN stated that if the Commission intended to make major changes to the current framework then hearings would likely be necessary, particularly on the issue of the status of competition. But up to that point the information and data, presented either in or in response to the Commission's proposal, had been insufficient to define either the issues or the associated problems, leaving it instead up to the parties to guess the scope and extent of the revisions the agency had in mind.[13] The Commission waited until December 16, 2005 announce its determination that a limited set of hearings would be held focusing on the state of competition in California.

In the interim, the Commission held three days of workshops on September 21-23, 2005. Several parties presented their proposed regulatory frameworks that they had been submitted in opening and reply comments. Commission staff and

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[11] Ex. D, *Response To Request For Motions For Hearings Of The Office Of Ratepayer Advocates, The Utility Reform Network And Disability Rights Advocates*, September 9, 2005. ("Motion for Hearing")

[12] Ex. D, *Motion for Hearing* at p. 1

[13] *Id.* at p. 2.

the other parties asked questions regarding the proposals. At the conclusion of the workshops the ALJ requested that the parties attempt to narrow the issues of disagreement among them through informal meetings in order to help the Commission ultimately craft a workable solution. Parties did meet informally on several occasions over the next few weeks, but did not reach any agreement on the underlying issues.

The Commission held evidentiary hearings on the status of competition on January 30 through February 2, 2006. Parties then filed opening and reply briefs on March 6, 2006 and March 24, 2006 respectively. On July 25, 2006, the Assigned Commissioner issued a Proposed Decision in this docket. Parties filed opening and reply comments on the Proposed Decision on August 15 and August 22, 2006.

The Assigned Commissioner then made substantive changes to the Proposed Decision in the short amount of time between the last comment period and the final vote. The Commission adopted its Final Decision, D.06-08-030 at its regularly scheduled August 24, 2006 public meeting on a unanimous vote with two separate concurrences by Commissioners Brown and Grueneich. The Final Decision was mailed to the parties on August 30, 2006.[14]

The Commission's Final Decision is almost 300 pages and, as discussed above, makes dramatic and extensive changes to the manner in which

[14] Ex. E, *D.06-08-030.*

telecommunications carries are regulated in California. In the most relevant sections of the Final Decision for this court's review, the Commission

- Declares the entire market for communications services in California sufficiently competitive or with sufficient potential for competition to significant reduce regulatory constraints on the largest carriers in the state;
- Lifts the requirement to geographically average rates, allowing carriers to raise rates for services not subsidized by high cost funds in targeted geographic areas;
- Eliminates all retail price regulations for business services and most residential services, except local phone service;
- Sets the date of January 1, 2009 for the elimination of all retail price regulations for basic residential local phone service, except those services subsidized by high cost funds, and low income programs;
- Moves to a one day approval period for the majority of carrier regulatory filings; and
- Eliminates all purportedly asymmetric marketing, disclosure, and administrative processes requirements.

On September 11, 2006, citing to the Final Decision at Ordering Paragraph 21 (the elimination of asymmetric marketing regulation), AT&T filed Advice Letter 28800 announcing the elimination of several key marketing and disclosure requirements in their tariffs. AT&T then filed Advice Letter 28982 on October

23, 2006, revising its initial proposal in part, but still eliminating a substantial portion of the disclosure requirements. The disclosure requirements at issue in AT&T's Advice Letters were developed in an unrelated complaint case against AT&T to remedy repeated abusive and deceptive marketing practices.

On September 29, 2006 TURN filed a joint Application for Rehearing of D.06-08-030, alleging several errors made by the Commission in the adoption of its Final Decision.[15] Most relevant for this court's review are the allegations that the elimination of geographic averaging and asymmetric marketing and disclosure requirements were beyond the noticed scope of the proceeding and lacked sufficient support in the record[16] and that the granting of retail pricing flexibility for business and residential service without making the proper findings was a violation of the Commission's statutory obligation for just and reasonable rates.[17]

On November 30, 2006 the Commission adopted Resolution L-339 in closed session.[18] The resolution dismisses the protests of AT&T's Advice Letters 28800 and 28982 and grants AT&T the permission to eliminate the marketing disclosure requirements. While some issues relating to the protests and the advice

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[15] *Joint Application of the Division of Ratepayer Advocates and The Utility Reform Network for Rehearing of Decision 06-08-030*, filed September 29, 2006 ("Application for Rehearing"). The document can be found on the Commission's website at http://www.cpuc.ca.gov/EFILE/R/60334.pdf.

[16] Ex. F, *Application for Rehearing* at pp. 3-10, 35-38.

[17] *Id.* at p.13-14, 22-24

[18] *Resolution No. L-339* (November 30, 2006) as posted on the Commission's web site at, http://www.cpuc.ca.gov/PUBLISHED/FINAL_RESOLUTION/62577.htm.

letters were designated for further consideration in a subsequent Phase 2 of docket R. 05-04-005, AT&T continues to operate free of the former requirements, and consumers have lost (for at least some undefined period) the consumer protections in place prior to the URF decision.

On December 19, 2006, the Commission issued its Decision on Rehearing, D. 06-12-044, granting limited rehearing on the single issue related to asymmetric regulations and dismissed all other allegations.[19]

IV.
THE COMMISSION FAILED TO PROCEED IN A MANNER REQUIRED BY LAW IN DECIDING ISSUES IN D.06-08-030 THAT WERE NOT IN THE SCOPE OF THE RULEMAKING IN VIOLATION OF *EDISON V. PUC* AND RULE OF PRACTICE AND PROCEDURE 6.3 (2005)

The Commission's Final Decision addresses two issues that TURN asserts are not within the scope of the proceeding and resolves those issues in a manner that lacks adequate record support.

- In Ordering Paragraph 1, the Commission eliminates the requirement to have geographically averaged rates for the four largest incumbent telecommunications carriers in California. As discussed below, this provision will have significant impact on the rates charged to consumers, especially those in areas of the state that do not have significant competitive alternatives for communications services.

[19] Ex. G, *Order Modifying and Granting Limited Rehearing of Decision (D.) 06-08-030, And Denying Rehearing of Decision, As Modified, In All Other Respects*, D.06-12-044, December 12, 2006. ("Rehearing Decision")

The issue of geographic averaging was not included in the OIR or Scoping Memo issued by this Commission. A very recent Court of Appeal decision found that where the Commission has failed to include an issue within the relevant scoping documents either at the start of the proceeding or by amending those documents during the proceeding, then that issue is not properly included in the Final Decision.

- Perhaps more egregiously, the Commission inserted Ordering Paragraph 21 in the final hours prior to issuing its Final Decision. This Ordering Paragraph eliminates all "asymmetric" requirements concerning marketing, disclosure, or administrative processes. Not only was the issue of asymmetric regulation for marketing and disclosure requirements not included in the OIR or Scoping Memo which focused on pricing regulations, the discussion of this provision is limited to one single paragraph in the Final Decision with no supporting citations. Indeed, this issue did not even appear in the Assigned Commissioner's Proposed Decision, but was added just prior to the vote on the decision. Not surprisingly, parties did not address this issue on the record.

This Commission has failed to proceed in a manner required by law by ignoring statutory authority, its own regulations, standard Commission practice

and relevant case law by including in its Final Decision issues that are clearly outside the scope of this proceeding.

A. P.U. Code Section 1701.1 and Rule of Practice and Procedure 6.3 Require That the OIR and Scoping Memo Must Define the Issues To Be Addressed In A Rulemaking to Ensure Procedural Due Process

Parties to an administrative agency rulemaking must be afforded procedural due process.[20] While such due process requirements may be "flexible" depending on the circumstances of the parties, the agency must at minimum provide parties notice and an opportunity to comment in all proceedings, including those categorized as quasi-legislative.[21]

Among the several code sections setting out the basic procedural requirements for Commission proceedings is Public Utilities Code Section

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[20] As this Commission noted in its *Decision D.04-03-009* (2004 Cal. PUC LEXIS 72, 64-65.), "Due process requires that parties be given notice and opportunity to be heard. There must be due notice and an opportunity to be heard, and the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon the evidence and not arbitrarily. *Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U.S. 388, 393; Due process requires a meaningful opportunity to be heard. *Alaska Roughnecks & Drillers Ass'n v. N.L.R.B* (9th Cir. 1977) 555 F.2d 732, 735; However, this does not mean that something less that a full evidentiary hearing is not sufficient; rather the amount of process due depends on the particular situation. *Mathews v. Eldridge* 424 U.S. 319, 343 (1976).

[21] *See, Southern Cal. Edison Co. v. Public Util Comm*, 101 Cal. App. 4th 982, 995, (2002), 2002 Cal. PUC LEXIS 4594. See also, *California Trucking Assoc. v. Public Utilities Commission*, 19 Cal. 3d 240, 244 (1977) (an opportunity to be heard requires more than merely being allowed to submit written objections to a proposal, but instead an opportunity to prove the substance of their protest.)

While courts have made distinctions between quasi-adjudicatory and quasi-legislative administrative proceedings, affording the latter fewer due process protections, the right to a notice and opportunity to be heard is such a core tenet as to be applicable in both situations.

1701.1,[22] which requires, in part, that the Assigned Commissioner "shall prepare and issue by order or ruling a scoping memo that describes the issues to be considered and the applicable timetable for resolution."[23] The Commission has implemented the statutory scoping memo requirements through its Rules of Practice and Procedure 5 and 6.3.[24] Rule 5 defines a scoping memo as, "an order or ruling describing the issues to be considered in a proceeding and the timetable for resolving the proceeding, as described in Rule 6.3." Rule 6.3 states,

> At or after the prehearing conference (if one is held), or if there is no prehearing conference as soon as possible after the timely filing of the responsive pleadings (protests, responses, or answers, as appropriate), the assigned Commissioner shall rule on the scoping memo for the proceeding, which shall finally determine the schedule (with projected submission date) and issues to be addressed. In an adjudicatory proceeding, the scoping memo shall also designate the presiding officer.

It is standard Commission practice to issue a preliminary scoping memo at the time the Commission initiates each investigation or rulemaking. Once parties have commented on the OIR or OII and the preliminary scoping memo therein, the Commission issues a revised scoping memo that sets forth the issues to be decided

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[22] Stats 1996 ch 856 §7 (SB 960).

[23] Pub. Util. Code §1701.1(b).

[24] 20 Code of California Regulations §§5(m), 6.3 (2005). The Commission revised its Rules of Practice and Procedure in September 2006. Unless otherwise indicated, cites to the Commission's Rules are to the version in effect at the time the proceeding was being litigated. The definition of "scoping memo" remains the same in the new version of the rules but renumbered to Rule 1.3. Rule 6.3 is renumbered to Rule 7.3 and adds some limited exceptions to the scoping memo requirement.

in the case. The Commission followed this general process in the URF rulemaking:

> The specific issues comprising the scope of this proceeding are listed in Appendix A. The final scope will be determined in one or more rulings issued by the assigned Commissioner pursuant to Rules 6(c)(2) and 6.3.[25] . . .
> The scope of this proceeding consists of those issues identified below [in Appendix A]. The scope of this proceeding may be revised and refined by the assigned Commissioner. Any issue not identified in this Appendix or a subsequent ruling by the assigned Commissioner is outside the scope of this proceeding.[26]

The court need look no further than the documents issued in this proceeding to see the importance the Commission places on scoping memos. The Commission relies on scoping memos to provide notice and opportunity to comment to the parties. Since the Commission began formal issuance of scoping memos in 1998, it has come to rely on them as the guideposts for its staff and the parties in any type of proceeding:

> Section 1701.1 requires the Commission to issue a scoping memo "that describes the issues to be considered and the applicable timetable for resolution" in relevant proceedings. The scoping memo serves two important purposes. It provides parties with notice of the range of issues the Commission will consider in the proceeding and is a document upon which parties should be able to rely in deciding whether and how to participate in a proceeding. The scoping memo is also a planning tool that permits the Commission and the parties to allocate time and resources among proceedings. As a planning document, it also mitigates the possibility that an issue would be litigated unnecessarily in more than one forum.[27]

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[25] Ex. A, *OIR* at p. 3.

[26] *Ibid.* at Appendix A-1.

[27] *Application of Pacific Gas & Electric*, A.98-07-058/98-08-012, D.99-06-085, 1999 Cal. PUC LEXIS 540, at p.9-10 (emphasis added).

Thus scoping memos play a vital role in providing parties due process in Commission proceedings. And it would be a clear violation of those due process rights, as well as a violation of statutory requirements and its own regulations, were the Commission to act in a manner inconsistent with the scoping memo when issuing a final decision. The Commission must limit its final decisions to issues clearly and specifically set forth in a scoping memo so as to ensure parties were given proper notice and a sufficient opportunity to comment on each issue.

Indeed, even if there were no specific rules requiring the Commission to issue a scoping memo, once such a document is issued the Commission and the parties must abide by the process outlined in this document. In many ways, issuing a scoping memo and then ignoring it is worse than not issuing a scoping memo at all. Once the parties are given notice in a written document as to the scope and schedule of a proceeding, it would be simple "good government" to abide by that directive and it would be plainly unfair to abandon the document at any point during the proceeding without further formal process.

As discussed below, in the instant case the Commission did not follow its statutory or regulatory obligations and did not honor the scoping memo issued in the proceeding by including extraneous issues in its Final Decision.

B. Under *Edison*, The Commission Must Amend the Scoping Memo To Include New Issues, and A Decision Addressing An Issue Not Within The Scope Of A Proceeding Violates Due Process.

The Commission's reliance on scoping memos to ensure proper notice of the issues in a rulemaking makes it vitally important that any decision be limited to the specific issues identified as being addressed in the rulemaking. As the Court of Appeal for the Second District recently found, in order to add a new issue to a rulemaking after the scoping memo has been issued, the Commission must properly amend a scoping memo in a manner that will ensure integrity of the process and sufficient due process for the parties.

In a June 2006 decision, *Southern California Edison Co. v. Public Utilities Commission*,[28] the Court granted a writ of review and overturned a Commission decision because the agency had failed to follow its scoping memo rule. The decision found that the Commission violated its own procedural rules by deciding an issue absent from the scoping memo but later raised in a party's comments.

The rulemaking that resulted in the *Edison* decision proposed the adoption of rules consistent with those governing state and federal works contracts prohibiting bid shopping and reverse auctions. The OIR stated that this description of issues constituted a preliminary scoping memo. A subsequent scoping memo stated that the issues remained the same as set forth in the preliminary scoping memo and provided that the assigned commissioner may

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[28] 140 Cal.App. 4th 1085, 2006 Cal. App. LEXIS 948, *review denied, S. Cal. Edison Co. v. PUC* 2006 Cal. LEXIS 10989 (September 13, 2006) ("Edison").

modify the scope of issues following receipt and evaluation of additional information and testimony. In its opening comments on the OIR, filed months late and long after the scoping memo had been issued, one party suggested two additional rules apart from those listed in the scoping memo, namely that the Commission require project labor agreements or the payment of prevailing wages in connection with utilities' construction and maintenance contracts. The Commission's decision adopted the prevailing wage proposal that was one of the commenting party's late-submitted suggestions.

In the subsequent order denying rehearing, the Commission admitted that the prevailing wage issue "was added after development of the scoping memo" but noted that the scoping memo permitted modification of the issues by the assigned commissioner.[29] The Commission asserted that this language put all parties "on notice that additional issues might subsequently be included in the proceeding" and noted the Commission's practice of "establish[ing] new rules or requirements in numerous proceedings without including those changes in the initial rulemaking or scoping memo, but incorporating those changes along the way pursuant to an ALJ or Assigned Commission Ruling as was accomplished here."[30]

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[29] *Edison* at 1094; *See also, Order Instituting Rulemaking on the Commission's Own Motion for the Purpose of Considering Policies and Rule Governing Utility Construction Contracting Policies, Order Denying Rehearing*, D.05-05-016 mimeo at 3, 2005 Cal. PUC LEXIS 172.

[30] *Edison* at 1094-1095

The Court of Appeal rejected the Commission's argument. The Court made the following findings: (1) neither the preliminary scoping memo nor the scoping memo included the prevailing wage issue; (2) the OIR's summary section stated that the Commission would consider rules to ensure contracting practices are consistent with state and federal contracting rules, but the OIR's subsequent discussion addressed only bid shopping and reverse auctions; and (3) the first mention of prevailing wages in the proceeding occurred in late-filed opening comments.[31] In light of these facts, the Court stated it "cannot fault the parties for failing to respond to the merits of proposals that were not encompassed in the scoping memo absent an order amending the scope of issues to include the new proposals."[32] Further, once the ALJ did amend the scope of issues to include the prevailing wage issue, the Court found that the time given for comment was insufficient.[33]

The *Edison* court then notes that,

> Assuming without deciding that the PUC in some circumstances may add a new issue after the scoping memo has issued, the question is the manner that it did so here and the circumstances of this particular proceeding.

The court found that the Commission's actions were prejudicial and therefore improper because it did not properly amend the scope of issues before addressing the new issue in its final decision in the proceeding. Instead, it relied

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[31] *Edison* at 1105-1106.

[32] *Edison* at 1106

[33] *Ibid.*

on parties' pleadings as the means to provide notice of a new issue in the proceeding. The court firmly rejected such an approach:

> In summary, the prevailing wage proposal was beyond the scope of issues identified in the scoping memo, the PUC violated its own rules by considering the new issue, and three business days was insufficient time for the parties to respond to the new proposals. We therefore conclude that the PUC failed to proceed in the manner required by law (Pub. Util. Code, § 1757.1, subd. (a)) and that the failure was prejudicial.[34]

The *Edison* decision should have come as no surprise to the Commission, seeing as how its logic was consistent with the agency's own prior statements interpreting its scoping memo rules:

> We can envision situations that would justify changing the scoping memo. To be sure, the Commission's proceedings should be conducted in ways that recognize changes in circumstances. The method for changing the scope of a proceeding, however, is not to proceed without regard for the scoping memo but to move for a change in the scoping memo. We encourage the parties to do so in future cases where circumstances warrant.[35]

Just as was the case in *Edison*, in the instant rulemaking the Commission failed to follow its own rules and standard practices with regard to scoping memos. As discussed below, the Commission's actions in the instant case are even more egregious and a more blatant violation of their own rules and procedural fairness than in the *Edison* case, where at least the parties were given an opportunity to comment on the controversial issue, albeit an inadequate amount

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[34] *Ibid.*

[35] *Application of Pacific Gas & Electric*, A.98-07-058/98-08-012, D.99-06-085, 1999 Cal. PUC LEXIS 540, at p.11 (emphasis added).

of time. Further, in the rulemaking at issue in *Edison* the scoping memo was amended, an action the court found to be too little process afforded much too late in the proceeding. Here, the Commission did none of those things, but simply issued a Final Decision addressing two issues that were not part of the Scoping Memo. Applying the Court of Appeal's recent findings in *Edison* to the even more egregious circumstances at hand, the court should vacate and remand the issues that were decided even though they were outside the scope of the Commission proceeding.

C. The CPUC Cannot Demonstrate That It Gave Proper Notice That Geographic Deaveraging Was An Issue in the Proceeding Simply By Pointing To The Larger Issue of Pricing Regulation And Asserting That the Deaveraging Issue Is Subsumed Therein.

1. The Scope of The Rulemaking Was Set Forth in The OIR and in the Scoping Ruling, and Geographic Deaveraging Was Not A Listed Issue

In both the OIR and the Scoping Ruling, the CPUC established the list of issues to be addressed in the URF proceeding. Despite the fact that "geographic deaveraging" of telephone rates was not listed as an issue to be addressed in the proceeding, in its Final Decision the Commission addressed that issue and reversed decades of practice by allowing geographic deaveraging of rates throughout California. Rate averaging, that is, requiring carriers to charge the same rate to all customers they serve even though the costs of providing service may vary among those customers, is a long-standing policy at the Commission

having its roots in the goal of universal service for all residents of California.[36] The deaveraging of telephone rates will have a profound and direct effect on consumers, and will constitute a fundamental change in the way telephone companies charge for their services. Deaveraging offers the carriers the opportunity to charge more in areas with limited or no competition, often more rural or economically challenged areas of the state, while charging less in more competitive regions of the state.

In its Application for Rehearing, TURN argued that it was improper for the Commission to lift the geographic averaging requirement as that issue had not properly been included in the scope of the proceeding in violation of *Edison* and relevant statute and CPUC procedural regulation.[37] In its Rehearing Decision, the CPUC dismissed TURN's arguments on this point as follows:

> The OIR provided broad notice that all pricing regulations were under consideration for revision, and that the adopted framework should be 'competitively neutral' and achieve uniformity across firms. [38]

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[36] Until issuance of D.06-08-030, the four respondent telephone companies were required by CPUC precedent to offer all tariffed services priced on a geographically averaged basis meaning at uniform rates throughout each carrier's service territory. Thus, an SBC customer in San Diego would pay the same monthly rate for basic business service as a customer purchasing the same service in Windsor, a suburb or Santa Rosa. When the requirement to average rates is ended, the term "geographically deaveraged" is used. *See*, In the Matter of the Application of Pacific Telephone and Telegraph Company, 14 CPUC2d 340, 18 CPUC2d 113 (1985).

[37] *Application for Rehearing* at p.3-10 (as posted on the Commission website at http://www.cpuc.ca.gov/EFILE/R/60334.pdf).

[38] Ex. G, *Rehearing Decision, slip. op.* p 7.

The Rehearing Decision goes on to quote a lengthy passage from the OIR, showing that "retail pricing flexibility" was the central issue in URF. The Rehearing Decision also quotes the OIR as stating that, "The *specific issues* comprising the scope of this proceeding are listed in Appendix A."[39]

But the Commission does not and cannot explain why the parties should have known geographic deaveraging was in the scope of the proceeding when the OIR, including Appendix A, makes no reference to geographic deaveraging. Rather, the OIR was long on vagueness and short on specifics. The OIR asked parties to address broad topics such as the criteria to be used to determine if a new framework is necessary and the implementation issues associated with an adopted new framework, in addition to asking the parties to propose their own regulatory frameworks.[40] The Rehearing Decision attempts to deflect this over-reliance on broad and vague language in the OIR with the unsupported assertion that "[a] requirement to geographically average prices is a form of price regulation."[41] Ergo, the CPUC suggests, "there was reasonable notice that the issue of

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[39] *Ibid.* (Added emphasis).

[40] To add more confusion, the OIR Appendix creates a Phase 2 of this proceeding to address, "Implementation Issues and Details Associated with the Adoption of a Uniform Regulatory Framework." There was no clear delineation as to what issues would be considered part of the yet-to-be proposed Framework and what would be considered an implementation issue for later analysis.

[41] Ex. G, Rehearing decision, *slip. op.*, p. 8.

elimination of geographic averaging was properly within the scope of this proceeding."[42]

The Commission is incorrect in its argument that the references to price regulation necessarily encompassed geographic deaveraging such that it clearly was at issue in this proceeding. As discussed above, the stated goal of the URF rulemaking was to review the then-current NRF pricing requirements to determine if they should be changed in a new competitive environment in order to create a more uniform set of regulations. NRF pricing requirements had nothing to do with the requirement to geographically average rates. Geographic averaging is a longstanding practice implementing the Commission's universal service policy, a practice that preceded NRF by years (if not by decades) and that is not a pricing regulation *per se*. To the extent the OIR directed parties' attention to NRF and the pricing regulations that were part of the fabric of that regulatory framework, parties received no meaningful notice that geographic deaveraging might be deemed within such a scope of issues. The Commission cannot be allowed to describe the scope of a proceeding so broadly that its notice to parties is ineffectual and so that it allows the Commission to later argue that *any issue* falls under the large umbrella it created. As such, if the Commission intended to revisit the price averaging requirement, then it should have explicitly so indicated in the Scoping Memo. It did not.

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[42] *Ibid.*

Any notion that the scope of the proceeding was clear from the beginning, or that geographic deaveraging was clearly part of that scope, is directly contravened by the fact that parties made repeated requests for clarification of scope throughout the proceeding. First, TURN and eight other parties filed a Motion For Change of Schedule (May 13, 2005) that pointed out several problems with the vague scope of the OIR and requested clarifications and amendments to the document. Second, during a Commission workshop and subsequent correspondence with the Administrative Law Judge TURN provided specific questions to be answered by a revised scoping memo include a clarification on the "type of pricing regulations" referenced in the OIR. The Final Scoping Memo acknowledges TURN's request for clarification. However, instead of providing a specific list of the pricing regulations to be proposed for elimination or otherwise addressed by parties, it merely cites back to the OIR and puts the burden on the parties to "expand upon the suggested elements or describe in detail any new elements."[43] Finally, in a pleading addressing the question of whether there should be hearings, dated September 9, 2005, TURN again noted that, "the CPUC broadly proposed significant changes to the existing regulatory framework for the four respondent utilities, but did not delineate the proposal for the parties," and requested that the Commission provide the parties with a "set of specific and proposed regulations with identified objectives." In the face of such repeated requests for clarification of the issues actually described in the Scoping Memo, it

[43] Ex. B, *Scoping Memo* at p.5.

makes no sense to argue, as the Commission has, that the Scoping Memo provided sufficient notice on geographic deaveraging, an issue not even mentioned therein.

In the Rehearing Decision, the CPUC attempts to downplay the import of TURN's request for clarification by noting that none of TURN's pleadings prior to issuance of the scoping memo mentioned geographic deaveraging. "As no party requested clarification on this issue [of geographic deaveraging], the Scoping Memo is silent on the matter."[44] This is a ridiculous and circular argument – does the Commission really mean to suggest that a party should read a Scoping Memo to mean that the issues it does not address are within the scope of the proceeding? In fact, the contrary conclusion is far more logical – if no party identified geographic deaveraging as an issue for the proceeding prior to the issuance of the Scoping Memo, then the absence of any mention of that issue in the Scoping Memo is most reasonably interpreted as confirmation that the issue is NOT within the scope. This is in part why the CPUC bears the responsibility of informing the parties of the scope of issues to be covered in the proceeding, not the other way around.

It was just this catch-22 situation that the court addressed in the *Edison* case discussed above. There, as here, the parties did not address an issue raised by other parties because it was not clearly in the scope of the proceeding. The court notes that, "We cannot fault the parties for failing to respond to the merits of proposals that were not encompassed in the scoping memo absent an order

[44] *Ibid.*, p. 9.

amending the scope of issues to include the new proposals."[45] In the instant proceeding, despite requests by the parties for more specificity, there was no attempt to amend the scope of issues to include geographic deaveraging as a proposal.

In its Rehearing Decision, the Commission attempts to refute application of the *Edison* case in single sentence by claiming that *Edison* "does not stand for the proposition that the Commission can consider only an issue expressly and specifically identified in the scoping memo for a proceeding."[46] But that is the exact result of the *Edison* case, where a party introduced a very specific proposal into the record of the proceeding. This issue of "prevailing wage" was clearly and directly related to other wage contracting proposals already identified in the initial scoping memo as being at issue, and could have been viewed as being in the scope merely because it is a type of labor wage issue. However, because the Commission did not *properly* amend the original scoping memo to explicitly include the new prevailing wage issue in the scope of proposals under the umbrella of labor contracts being considered, the court found the Commission's subsequent treatment of that proposal in its final decision was improper.[47]

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[45] *Edison* at p. 1106.

[46] Ex. G, *Rehearing Decision* at p. 7.

[47] *Edison* at p. 1105-1107. Interestingly, in the Edison facts the ALJ does ultimately amend the scoping memo to add the controversial proposal, but the court found that it was too late in the schedule of the case leaving parties an inadequate amount of time to comments. Here however, the Commission did not

The omission of geographic deaveraging from the list of issues in the scope of this proceeding was critical. Once again, as the court found in the *Edison* case, "the PUC's failure to comply with its own rules concerning the scope of issues to be addressed in the proceeding therefore was prejudicial." Had TURN understood at the outset that the CPUC intended to address the issue of geographic deaveraging, TURN would have commented extensively on the issue. TURN was not accorded that opportunity, and, accordingly, was harmed by the Commission's inclusion of geographic deaveraging in its Final Decision.

The Court must firmly reject the Commission's attempt to rely on the language in the OIR and Scoping Memo regarding "pricing regulations" to establish that parties should have known that the more discrete geographic deaveraging issue was also on the table. Any other outcome invites the Commission to establish the vaguest, broadest scope possible at the outset of a proceeding, to better enable consideration of any related issue the agency may decide is relevant at the time the final decision is considered. Clearly the Commission's actions here were prejudicial to the parties and illegal and should be overturned.

2. The CPUC Cannot Rely On Parties' Comments Or On Briefs As A Substitute For A Proper Scoping Memo

The CPUC attempted, in D.06-08-030, to justify its consideration of geographic deaveraging by pointing to discrete sections of a few parties' filings in

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even attempt to add geographic deaveraging to the scope prior to its Final Decision.

the proceeding. For example, the Final Decision notes that the Division of Ratepayer Advocates makes a downward geographic deaveraging proposal in its opening comments, that Cox states a position in its opening comments that the current averaging requirement should remain unchanged, and that AT&T addresses Cox's statement in its reply comments while also making clear that AT&T is not proposing geographic deaveraging.[48] Based on these comments – two of which made no proposal to change the averaging requirement and one which proposed just very limited deaveraging – the CPUC concluded that unfettered geographic deaveraging for all services was clearly an issue from the beginning of the proceeding.

In the Rehearing Decision, the CPUC expanded on this list of references by including a cite to TURN's cross-examination of an AT&T witness and a vague reference to "statewide rate uniformity" by Verizon's expert witness in opening comments.[49] The cross examination concerned a statement in AT&T's written testimony that AT&T was *not* proposing geographic deaveraging. TURN never advocated geographic deaveraging, nor did any other party advocate the type of wholesale geographic deaveraging the CPUC adopted. Taking actions to confirm

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[48] Ex. E, *D.06-08-030* at p.135-138. The court should note that the vast majority of cites to support its geographic deaveraging are to parties' briefs and not to their original proposals. Clearly, by the time briefs are filed, it is too late to add a new issue to the proceeding.

[49] Ex. G, *Rehearing Decision, slip op.* at p. 11.

what is not proposed by other parties cannot serve as a vehicle for bringing the subject of those non-proposals within the scope of a proceeding.

Under the *Edison* line of reasoning, the Commission's reliance on parties' pleadings to demonstrate that an issue is properly within the scope of the proceeding is erroneous. As discussed above, pursuant to statute and case law, it is the Commission's responsibility to ensure that parties have proper notice and opportunity to be heard regarding the issues in a proceeding. The fact that parties may raise a new issue in their pleadings does not automatically put that issue within the scope, nor should it. As this Court is well aware, parties to administrative proceedings raise all sorts of issues and concerns without regard to the due process rights of other parties to the proceeding. To allow the parties to control the scope of the proceeding would make a mockery of the process. In this case, as in the *Edison* case, to the extent that the Commission itself understood geographic deaveraging to be an issue in the proceeding, it should have amended the OIR or Scoping Memo to include that specific proposal. It did not and, according to *Edison*, geographic deaveraging therefore was not in the scope and could not be considered in the Final Decision.

D. The CPUC Gave No Notice That It Was Proposing To Eliminate So-Called Asymmetrical Marketing Regulations

The Final Decision also included a provision that orders the elimination of what it terms "asymmetric requirements." [50] As discussed below, not only was

[50] Ex. E, *D.06-08-030* at p. 282 and Ordering Paragraph 21.

this issue outside of the scope of the issues identified in the Scoping Memo, its inclusion in the Final Decision was the product of unusual procedural events that prevented parties from having any possible notice of this issue and proper opportunity to comment.

1. The Language Pertaining to Elimination of Asymmetric Rules Was Inserted Into the Final Decision Less Than 48 Hours Before the CPUC Voted on D.06-08-030 And With No Notice To the Parties that This Issue Was in the Scope of the Proceeding

Pursuant to CPUC Rule 14.1(b), on July 25, 2006, the CPUC issued a proposed decision in the instant rulemaking. Parties were afforded a twenty-day comment period and a five-day reply comment period, which closed on August 22, 2006. The CPUC had less than forty-eight hours to incorporate and respond to reply comments before approving a final decision, D.06-08-030, on August 24, 2006. In the Final Decision, there appeared for the first time language in Ordering Paragraph (O.P.) 21, which reads,

> 21. With the exception of conditions relating to basic residential rates, all asymmetric requirements concerning marketing, disclosure, or administrative processes shall be eliminated.[51]

The language in Ordering Paragraph 21 did not appear in the Proposed Decision. Rather, the paragraph was inserted into the draft final decision in the brief period between the close of the reply comment period at 4:30 p.m. on August 22, 2006, and the CPUC's vote on the morning of August 24, 2006. Thus, no

[51] Ex. E, *D.06-08-030* at p. 282. The Final Decision does not define "asymmetric requirements".

party had the opportunity to comment on the language contained in O.P. 21 as it appeared in D.06-08-030.

Here, in addition to the defects that riddle the geographic deaveraging issue, the Commission cannot even point to parties' pleadings in the record that address this issue because of these procedural irregularities.[52] Neither the OIR nor the Scoping Memo suggested that the review and possible elimination of "asymmetric requirements concern *marketing, disclosure, or administrative processes*" would be an issue in this proceeding. On this issue the Commission does not attempt to rely on the vague language regarding pricing regulations in the OIR or Scoping Memo as the basis for including this clearly non-pricing element to the adopted regulatory framework. Instead, the Final Decision includes a single unsupported paragraph to justify this sweeping and substantive provision that appears to have little relationship to the rest of the issues in the Final Decision. The end result is the same as with geographic deaveraging; with regard to the elimination of asymmetric regulation, the Commission has directly violated its statutory requirements, procedural rules, and relevant case law holdings by including this

[52] A review of parties' pleadings reveals that the only call to eliminate marketing asymmetric requirements is found in documents relating to informal discussions among the parties early in the proceeding and in AT&T's opening comments on the proposed decision. Neither of these documents gives parties any meaningful notice that such an issue would be in the scope of the proceeding or addressed in the Final Decision.

provision in the Final Decision despite the underlying issue not being a part of the scope of the proceeding as set forth in the scoping memo.[53]

2. The Commission's Elimination of Asymmetric Marketing Regulations in D.06-08-030 Has Direct Negative Consequences for AT&T Customers That Must Be Reversed Immediately to Avoid Consumer Harm

As *Edison* holds, the Commission's action to rule on issues not properly within the scope of a proceeding is prejudicial and that is certainly the case here. But the extent of the harm of Ordering Paragraph 21 can only be understood through the subsequent events that unfolded as a result of this provision being included in the Commission's Final Decision. On September 11, 2006, just twelve days after the Final Decision was mailed to parties on the service list,[54] AT&T submitted an informal advice letter to the CPUC relying on Ordering Paragraph 21 in D.06-08-030 for authority for its request. The stated intent of Advice Letter 28800 was to withdraw a series of customer notice and disclosure rules that the CPUC had imposed on AT&T as the remedy for a complaint filed by the Utility Consumers Action Network (UCAN).[55] In that particular complaint proceeding, UCAN and others had alleged, and ultimately, the CPUC found that, AT&T had engaged in abusive marketing practices. As a result, the CPUC imposed on

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[53] *Edison* at p. 1105-1107.

[54] Ex. E, *D.06-08-030* was mailed on August 30, 2006.

[55] *Utility Consumers Action Network et al. v. Pacific Bell and Related Matters*, Case ("C.") 98-04-004, and related cases C.98-06-003, C.98-06-027, C.98-06-049, and Investigation ("I.") 90-02-047), D. 01-09-058, 2001Cal. PUC LEXIS 914, as modified by D.02-02-027.

AT&T a set of very specific marketing and disclosure rules that appear in AT&T's tariffs.

On November 30, the CPUC issued Resolution L-339, which addressed the two advice letters and the protests thereto.[56] In Resolution L-339, relying exclusively on Ordering Paragraph 21 in D.06-08-030, the CPUC dismissed the protests and granted AT&T's requested changes to its tariffs thereby eliminating key marketing and disclosure rules,

> However, because Ordering Paragraph 21 of D.06-08-030 allows carriers to eliminate "asymmetric requirements concerning marketing, disclosure, or administrative processes " and because the tariffs became effective on one-day's notice pursuant to Ordering Paragraph 9 of D.06-08-030, the tariffs will remain in effect pending resolution of the issues raised in the protests.[57]

AT&T's request to make extensive changes to its tariff to remove vital consumer protections demonstrates the scope and breadth of Ordering Paragraph 21. The eliminated protections were put in place as the result of a multi-year investigation and litigation against AT&T where in the end most of the allegations of illegal and unfair business practices were proven true. This litigation was completely unrelated to anything at issue in the instant case, including the New Regulatory Framework (the stated focus of this proceeding). Indeed, one of the plaintiffs in the marketing abuse litigation was not even a party to this proceeding.

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[56] TURN, DRA and UCAN filed protests of AT&T's AL 28800. Partially as a result of those protests, AT&T filed a subsequent Advice Letter 28982 revising its proposed edits to the tariff, but still eliminating several of the key disclosure requirements.

[57] *Resolution No. L-339*, November 30, 2006.

No party to this proceeding could have guessed, much less been deemed to have received proper notice, that the Commission would include language so broad as to allow the elimination of these types of prior Commission rules having nothing to do with uniform pricing regulation.

This, however, is not the end of the story. After the Commission granted AT&T's request to eliminate the customer disclosures, the Commission in its Rehearing Decision, suspended Ordering Paragraph 21, but on a *prospective* basis only. In the Rehearing Decision, issued only 14 days after it relied on OP 21 to grant AT&T its broad relief, the Commission acknowledges that "we do have concerns with Ordering Paragraph 21" and that both the protests of AT&T's advice letters discussed above and TURN's Application for Rehearing on this issue "need to be addressed further."[58] The Commission has slated this further consideration of OP 21 for Phase 2 of the current docket.

3. The Court Must Act Quickly To Reinstate Vital Customer Disclosure Requirements Despite Commission Plans to Review Ordering Paragraph 21 in Phase 2

The Commission's decision to further review Ordering Paragraph 21 in Phase 2 of its rulemaking does not make this issue inappropriate for the court to decide at this time. Most importantly, the Commission suspended the effect of OP 21 on a prospective basis only, thereby allowing AT&T to continue to benefit from the elimination of the marketing disclosures it was granted in reliance on OP

[58] *Ibid.* at p. 3. See also, Ex. G, *Rehearing Decision* at p. 29.

21.[59] By allowing those rule changes to remain in effect pending subsequent review, a purely discretionary act on the part of the Commission, the CPUC is subjecting potentially millions of AT&T customers to abusive marketing practices similar to those the CPUC found unacceptable in D.01-09-058.[60] This potential harm from the return of such marketing practices is not something that can be easily undone once a consumer has experienced the practice. Therefore, the court cannot wait the several months that it will likely take the Commission to issue a decision on its review of Ordering Paragraph 21 and its application to AT&T's marketing disclosure requirements.[61]

The court must act quickly to correct the Commission's illegal and egregious act that has current potential to harm AT&T consumers, by suspending the Ordering Paragraph in its retroactive application.[62] The provision was improperly included in the Final Decision with no record support and outside the scope as originally noticed to the parties. It cannot be permitted continue to harm consumers while the Commission fiddles.

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[59] Ex. G, *Rehearing Decision* at p. 30.

[60] AT&T is the largest telephone company in California.

[61] *See, Assigned Commissioner's Ruling and Revised Scoping Memo*, R.05-04-005 (Phase 2), December 21, 2006, stating that " My goal is to resolve this phase of the proceeding in an expeditious manner. I anticipate that the resolution will not exceed 18 months from the date of this scoping memo, pursuant to Pub. Util. Code § 1701.5(a)."

[62] While TURN has an Application for Rehearing pending at the Commission on Resolution L-339, filed January 3, 2007, that decision is specific to the AT&T advice letter issues and does not generally address Ordering Paragraph 21 of the Final Decision challenged in this writ. As such that Application for Rehearing cannot bar this challenge.

V.
THE COMMISSION ERRED BY FAILING TO MEET THE REQUIREMENTS OF PUBLIC UTILITIES CODE SECTION 495.7

A. The Commission Has A Fundamental Responsibility To Ensure That Rates Are "Just And Reasonable"

One of the most basic and fundamental goals of regulation established by the California legislature for the CPUC is to ensure that rates paid by ratepayers are "just and reasonable." Under Section 451 of the California Public Utilities Code

> All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlwful.

Similarly, Section 454 provides,

> ...no public utility shall change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified.

Historically, the Commission has used rate of return regulation, pricing controls and tariffing, and related tools to ensure that telecommunications prices are "just and reasonable." Since the late 1980s, as the Commission saw evidence that some aspects of the telecommunications market were becoming more competitive, it introduced alternative regulatory approaches that rely more on competitive or market forces. Section 495.7 was added to the Public Utilities Code as part of this process. In 1995, the Commission sponsored legislation to

permit it to exempt carriers who seek a waiver of the requirement to file and make public rates, terms and conditions for specific services.

It is clear from the legislative history of Assembly Bill ("AB") 828 (the bill that created Section 495.7) that the Legislature was less concerned with the technical aspects of tariffing rules and more concerned with ensuring that rates are "just and reasonable:"

> When markets are not fully competitive, but some competitors are in the market, the bill permits the PUC to waive the filing requirements when the PUC has determined that mechanisms are in place to minimize the risk to consumers and competitors from unfair competition and anticompetitive behavior. These protections are necessary, but do not address the concern that prices are fair. In fully competitive markets competition ensures that prices are fair. In markets which are not fully competitive, or where competition may be weak or emerging, the markets cannot ensure that prices are fair. How will the PUC ensure that prices are fair and reasonable for these services, given the statutory mandate that all charges by any public utility be fair and reasonable?[63]

The Legislature appears to have addressed this concern by requiring the Commission to determine that specific criteria are met in order to no longer require that rates be justified. Furthermore, those criteria are to be applied on a specific service-by-service basis. Section 495.7. Here the Commission acted in contravention of the statute and thus abused its discretion when it failed to address those criteria.

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[63] AB 828, Senate Floor Bill Analysis, 8/30/95, p. 3 see http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_08010850/ab_828_cfa_950830_151626_sen_floor.html

In its Decision on Rehearing, D.06-12-044, the Commission argues that TURN's arguments are not ripe for review because it did not make any determination regarding detariffing and therefore did not need to make any findings pursuant to Section 495.7.[64] However, the Commission clearly indicated in the URF decision its intent to detariff.[65] Moreover, by lifting the pricing restriction embodied in geographic averaging, the Commission has effectively eliminated its ability to review rate changes, the *sine qua non* of tariffing.

B. The Requirements of Section 495.7

Section 495.7(b) establishes that the Commission must meet specific criteria before the Commission exempts a carrier from justifying the reasonableness of its rates for specific services. Pursuant to Section 495.7(b)(1), the Commission must find that the carrier "lacks significant power in the market for that service for which an exemption …is being requested." The Code also establishes criteria the Commission must consider to determine market power including, but not limited to, "company size, market share, and type of service for

[64] Ex. G, *Rehearing*, at p. 17.

[65] See for example Ex. E, *D.06-08-030* FOF 77 ("We can rely upon market forces, rather than regulatory proceedings concerning tariffing and contracting practices…) and COL 34 ("There is no public interest in maintaining outmoded tariffing procedures that require review of cost data and delay service provision to customers and this practice should end."

which an exemption is being requested. The commission shall promulgate rules for determining market power based on these and other appropriate criteria."[66]

1. Any Market Power Analysis Must Include An Assessment Of Market Share

While the Commission insists in its Decision on Rehearing that it made no findings under Section 495.7, it is apparent that the Commission's market power analysis attempts to be consistent with the first criterion of Section 495.7(b)(1). The Commission asserts in the URF decision that it has fully analyzed and assessed the ability of the ILECs to exert market power and concluded that these carriers lacked the "ability to limit the supply of telecommunications services in the voice communications market, and therefore lack the market power needed to sustain prices above the levels that a competitive market would produce."[67] The Commission' analysis and conclusion is so flawed as to constitute an abuse of discretion under Public Utilities Code Section 1757.1(a)(1).

One of the mandatory elements of the Section 495.7(b)(1) market power criteria is the analysis of "market share." Yet, the Commission specifically rejected market share as a necessary element in analyzing market power deeming

[66] Alternatively, the Commission can exempt a carrier from justifying rates if the Commission finds that "competitive alternatives are available to most consumers" for the specific service and that "sufficient consumer protections exist" to protect consumers from "unfair competition or anticompetitive behavior." (Section 495.7(b)(2) and 495.7(b)(2). The Commission choose not even attempt to meet these criteria.

[67] Ex. E, *D.06-08-030*, FOF 50.

them "inherently backward looking and not a good predictor of future developments."[68] Using this finding as a launching pad, the Commission also rejected the use of the Department of Justice/ Federal Trade Commission *Horizontal Merger Guidelines* ("Merger Guidelines") and the Hirschman-Herfindahl Index ("HHI") measurement of market concentration. HHI is the most accepted standard for measuring market share, and one the Commission has in the past employed for just this purpose. Market share may not be the sole determinant of market power. However, it is one indicator and, most importantly, is one of the factors that Section 495.7 requires the Commission to assess. Further, the California Court of Appeals has recognized that,

> As a practical matter, market power is usually equated with market share. Since market power can rarely be measured directly by the methods of litigation, it is normally inferred from possession of a substantial percentage of the sales in a market carefully defined in terms of both product and geography.[69]

Thus, the Commission erred in ignoring this aspect of the market power analysis.

In addition, the Commission has ignored the basic methodology it utilized since 1987 to assess whether to allow particular carriers regulatory flexibility including the deregulation of the provision of specific services. In numerous cases beginning with D.87-07-017, the Commission allowed regulatory flexibility on a

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[68] *Ibid.*, FOF 57.

[69] *Roth v. Rhodes,* 25 Cal. App. 4th 530 (1994), at p. 542. *See also, Exxon Corp. v. Superior Court,* 51 Cal. App 4th 1672 (1997), at p. 1682; *and Redwood Theatres v. Festival Enterprises,* 200 Cal. App. 687 (1988), at p. 704.

limited basis while closely monitoring the effects of looser regulation "to assess actual marketplace responses and any benefits or costs to ratepayers."[70] At the same time, the Commission insisted that "Information on market power criteria, including market share, OCC facilities ownership, ease of market entry and exit, individual carriers' size and growth potential, and consumers' views on the substitutability of AT&TC and OCC services, should be gathered for examination..."[71]

Against this background, the Commission and the Legislature, when considering the language that became Section 495.7, still included a directive for the Commission to consider a market power analysis including an assessment of market share.

Furthermore, even under the more relaxed regulatory scheme called the New Regulatory Framework ("NRF"), the Commission had continued to consider applications by the NRF-carriers (the ILECs) for relaxed regulation on a case-by-case, service-by-service basis and on such a basis utilized elements of the Observation Approach and the Merger Guidelines.[72] In addition, in these situations, market share was at least a part of the analysis, although if the carrier could demonstrate that the market for a service was highly competitive market

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[70] *D.87-07-017,* 1987 Cal. PUC LEXIS 124, 24 CPUC 541,*3.

[71] *Ibid.*, COL 6.

[72] See, *D.99-06-053,* 1999 Cal. PUC LEXIS 309 (deregulation of Pacific Bell's inside wire service; and D.00-05-020, 2000 Cal. PUC LEXIS *316* (deregulation of Pacific Bell Centrex and related services).

share analysis was not required. Significantly, unlike the instant URF decision, all prior Commission decisions relating to the relaxation of regulatory constraints were considered on a service specific basis. In the URF decision, the Commission has abandoned this long-standing approach and adopted carte blanche deregulation contrary to all Commission precedent and contrary to the requirements of Section 495.7.

2. The Commission's Market Power Analysis Is Not Supported By The Record

The URF decision relies on anecdotal, vague and speculative evidence to justify the deregulation of the dominant telecommunications carriers in California based on the prospect of competition. The threshold for permitting such deregulation is relatively low under Public Utilities Code Section 495.7(b)(2), as it may occur where the carrier is "offering a service in a given market for which competitive alternatives are available to *most consumers*." (emphasis added) But the Commission's assessment of market power and determination of whether such alternatives are indeed available lacks sufficient support.

This is particularly evident in the Commission's speculations that geographic deaveraging may have salutary effects for consumers, especially rural consumers. In its attempt to justify the abandonment of the long-standing practice of geographic deaveraging, the Commission states,

> A requirement of geographically averaged prices *could lead to* the provision of services by high-costing but subsidized technologies, while discouraging service by low-costing but unsubsidized services. As an example, in many rural areas, it *may prove* less expensive to provide dial

> tone telephone service via wireless technologies than by subsidizing the construction of long copper wire traditional telephone service connections.[73]
>
> Indeed, allowing geographically unfettered pricing for telecommunications services not supported by CHCF-B *may improve* market competition and the supply of telecommunications services in rural areas. Our current policy of requiring geographically averaged pricing *may encourage* an oversupply of wireline services in high-cost areas – that is, the geographic averaging requirement *may promote* use of high-cost services when an efficient market might provide similar services with a lower-cost technology (such as wireless or VoIP services).[74]
>
> Allowing geographically unfettered pricing for telecommunications services not supported by CHCF-B *will likely* improve market conditions.[75]

These speculative findings resulted in an unsupportable Commission decision that fails to meet the standard required by Public Utilities Code Section 1757.1(a)(4) and should be rejected by this Court.

The Commission attempted to shore up its analysis in its Order on Rehearing , citing the testimony of AT&T's witness as justification for permitting geographic deaveraging . However, the "evidence" cited by the Commission is as general and speculative as the Commission's findings in the URF decision, as it merely states

> Cox's proposal [to continue price averaging] is contrary to sound economics. Price averaging distorts the relationship between costs and retail prices, preventing efficient facilities-based competition...

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[73] Ex. E, *D.06-08-030*, at p. 139 (emphasis added).

[74] *Ibid.*,p. 142 (emphasis added).

[75] *Ibid.*, FOF 66 (emphasis added).

> ...In urban centers, the cost of providing service can be well below the average price, while in more rural areas, the cost of providing service can be well above the average price. This disparity in the cost-price relationship has fostered facilities-based entry in urban areas and inhibited facilities-based entry in rural areas. Price deaveraging would more closely align costs and prices, creating opportunities for competitors to offer service over their own facilities in more rural areas.[76]

The Commission also relies on Verizon's witness, whose testimony merely states that statewide rate uniformity "may prevent some pro-competitive price adjustments" and "impede the full realization of the benefits of competition in the state."[77] Thus, the Commission's justification for statewide geographic deaveraging rests solely on economic and competitive theory, and lacks any assessment about its impact in markets lacking competitive alternatives.

The Commission attempts to justify its conclusions with statements such as "[n]o market is perfectly competitive"[78] and "[i]n all markets, competition takes place 'at the margins' and competition results from the ability of firms at the margins to increase their production to take advantage of market opportunities."[79] Even if true, these statements are no substitute for the type of evidence required to demonstrate that "most consumers" within a particular market have access to competitive alternatives on a service-by-service basis, as required by the Public Utilities Code.

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[76] Ex. G, *Rehearing*, at p. 10.

[77] *Ibid.*, at p 11.

[78] Ex. E, *D.06-08-030*, FOF 58.

[79] *Ibid.*, FOF 59.

3. The Commission Decision Violates Section 1705 By Failing To Include Sufficient Findings And Conclusions on Disputed Issues Relating to Its Market Power Analysis

Public Utilities Code Section 1705 provides that Commission decisions shall contain, "separately stated, findings of fact and conclusions of law . . . on all issues material to the order or decision." As the agency has noted a number of times, this provision "requires sufficient findings and conclusions to assist the [reviewing] court in ascertaining that the Commission acted properly and to assist parties in preparing for rehearing or court review."[80]

In order to find that the ILECs lacked market power and that wireless and Voice over Internet Protocol ("VoIP") services were substitutes for traditional wireline phone service, the Commission relied on information provided by the carriers, and ignored several significant points that undermined the carriers' assertions.

In particular, the Commission completely ignored evidence (and, as a result, failed to provide findings of fact or conclusions of law) on the following points:

- The largest wireless carriers are owned by the ILECs, such that the loss of a traditional "wireline" phone customer is often a case of a customer moving from one of a carrier's services (wireline) to another of the same carrier's services (wireless).

[80] See, for example, *D.04-02-028*, at p. 7 (2004 Cal. PUC LEXIS 19, *11-12).

- VoIP availability requires the purchase of a broadband connection, such that VoIP is only a competitive option for local phone service where broadband service is available, and even then brings with it a total price that must reflect the amount a consumer would pay for a broadband connection and VoIP telephone service.
- Competitive alternatives of any sort are not available to many California residents, particularly in rural locations.

While the Commission did make findings that wireless and VoIP represent a significant competitive threat to the ILECs, no finding in D.06-08-030 addresses the evidence presented by TURN and others that wireless competition is, in a significant number of cases, really an AT&T or Verizon wireline customer moving to the wireless subsidiary of the customer's existing wireline carrier. Instead, the Commission wholeheartedly embraces the industry's telling of the story, such as where it cites Verizon's argument that "[t]he record shows that wireless is leading this intermodal assault on incumbents in California, with wireless cannibalization being the 'key killer' of primary consumer lines"[81] to support its finding of sufficient competition. Factual evidence that did not neatly fit within this view of the industry was simply ignored when it came time to present findings of fact and conclusions of law. But such an approach is not permitted under Section 1705 of the Public Utilities Code.

[81] Ex. E, *D.06-08-030*, at p. 92.

The Commission also makes a finding that "[b]roadband is available to most Californians."[82] This truism fails to address a critical point undermining the agency's decision, broadband access comes at a cost to the consumer. And that cost of access, plus the cost of VoIP service, means that for many Californians such service is not competitive with the ILEC's wireline offering, and may price many consumers out of the market for VoIP as a choice.

Finally, the Commission completely ignores evidence that competitive alternatives are not widely available to many rural customers, even as it suggests as much in the findings it made.[83] While there is some discussion of the lack of competition in rural areas (mostly as restatements of parties' positions, some references to the subsidy system for rural and high cost areas, and, as discussed more fully below, some speculation that geographic deaveraging may help rural customers get access to more competitive options), the decision is devoid of any findings on the rural issue. This is particularly disturbing in a decision that purports to be the death knell of geographic averaging, a principle that has been critical to ensuring the availability of telecommunications services in rural California.

VI.
CONCLUSION

[82] *Ibid.*, FOF 43.

[83] When FOF 43 notes that broadband is "available to most Californians," it concedes that such service is not available to some portion of Californians, but does not attempt to explain where those consumers would find their competitive options that render regulation of local phone service no longer necessary.

For the foregoing reasons, Petitioner urges this Court to issue the writ of review and after review, enter judgment setting aside Decision D.06-08-030, directing the Commission to vacate the decision, and remanding this matter to the Commission for further proceedings consistent with the Court's ruling.

Dated: January 18, 2007

By: 

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Attorneys for Petitioner
The Utility Reform Network

CERTIFICATE OF WORD COUNT

(CAL. RULES OF COURT, RULE 8.204)

The text of this petition consists of 13,988 words as counted by Microsoft Word 2003 word processing program used to generate this petition, excluding tables and this certificate.

Dated: January 18, 2007

William R. Nusbaum

CERTIFICATE OF SERVICE

I hereby certify that I am a citizen of the United States, over the age of eighteen years. My business address is 711 Van Ness Ave, Suite 350, San Francisco, California 94102, and am not a party to the within action.

On January 18, 2007 in San Francisco, California, I caused to be deposited in the United States Postal Service for mailing copies of the following:

PETITION FOR WRIT OF REVIEW; MEMORANDUM OF POINTS AND AUTHORITIES; AND APPENDIX OF EXHIBITS IN SUPPORT OF PETITION (Bound Separately)

on the Executive Director and on the General Counsel of the California Public Utilities Commission and on the following real parties in interest:

Elaine Duncan
Attorney for Verizon California Inc.
711 Van Ness Ave., Suite 300
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Michael D. Sasser
Attorney for AT&T California
525 Market St., 20th Floor
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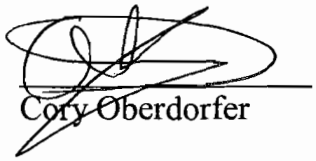
E. Garth Black
Attorney for Frontier Telecommunications Co. of California
Attorney for SureWest Telephone
201 California St., 17th Floor
San Francisco, CA 94111

In addition, Petitioner has forwarded via email an electronic version of the above-mentioned documents to each participant listed on the Service List for the decisions pertinent to the instant writ in the event any of those participants deem themselves a real party in interest. As part of said email, Petitioner invited participants to request a bound copy of the above-mentioned documents.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 18, 2007, at San Francisco, California.



Cory Oberdorfer